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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID J. NIERA,

Defendant and Appellant.

B213812

(Los Angeles County  
Super. Ct. No. SA067556)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Antonio Barreto, Jr., Judge. Affirmed.

Murray A. Rosenberg, under the appointment by the Court of Appeal, for  
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M.  
Roadarmel, Jr. and Rama R. Maline, for Plaintiff and Respondent.

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David J. Niera appeals from the judgment entered after he was convicted of first degree residential burglary. He claims that there was insufficient evidence he committed the crime, that the trial court abused its discretion by not dismissing several Three Strikes allegations, and that sentencing error occurred. We disagree and affirm.

### **FACTS AND PROCEDURAL HISTORY**

When Carol Felestian returned home from work on the night of April 20, 2008, she discovered that someone had broken into her second story apartment and taken jewelry and gold coins. Video surveillance cameras posted throughout the multi-story building recorded Niera moving about the building that afternoon. The security video showed Niera entering the building at 1:50 p.m. Around 1:54 p.m., a fourth floor camera was tilted to the left. At 1:57 p.m., Niera is seen on the third floor, with gloves in his back pocket. A few seconds later, the camera is turned face down and Niera is out of sight. At 2:15 p.m., Niera is seen by a third floor camera, and one minute later, Niera is recorded reaching up and adjusting that camera. One minute after that, a camera on the second floor was turned up toward the ceiling. In addition to the video, a third floor tenant saw Niera when she answered her door right before 2:00 p.m. in response to someone persistently ringing her doorbell. The tenant opened the door and saw Niera, who apologized and said he thought he was on the fourth floor. Another third floor tenant stepped outside her apartment around 2:30 p.m. and found the torn-off corner of a dollar bill taped over the front door's peephole. Niera was a stranger who did not have permission to be in the building.

After discovering the break-in, Felestian alerted building manager Deborah Cool, and then called the police. Cool played back the surveillance video while waiting for the police to arrive. Some police officers arrived and watched the surveillance tape. A police fingerprint specialist came back the next day and dusted various items for fingerprints. The specialist determined that those prints belonged to Felestian and her husband, however.

Three days after the break-in, Cool heard someone “messaging” with the building’s glass entry doors. Cool, whose apartment was near those doors, was often able to hear tenants use their keys to unlock the doors, but the noise she heard this time was different. Cool looked out her window and saw Niera standing outside. She phoned the police, then watched as Niera walked down the street and out of sight. Los Angeles Police Officers Carillo and Mendoza were on patrol nearby when they were notified about a wanted burglary suspect in the area. They spotted Niera, who matched the suspect’s description, walking down the street. When Niera went to the entry doors of another apartment building and began shaking those doors, the officers stopped him. Carillo searched Niera and found a screwdriver, a knife, and a pair of gloves. Carillo had made about 100 burglary arrests, and said the suspects often carried gloves and screwdrivers.

Other officers brought Cool to the arrest location for identification, and she said Niera was the man she saw on the April 20 surveillance video. When Cool returned home, she checked the area to see if it was safe. Cool saw that the front gate latch, which had been working the night before, was now broken. Surveillance video from around 12:59 p.m. that day showed Niera walking to the front gate, looking around, and manipulating the gate handle. He then took an object from his pocket.

Niera was charged with one count of first degree residential burglary. The information also alleged that he had eight prior felony convictions for purposes of both the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and the five-year sentence enhancement for prior serious felony convictions provided by Penal Code section 667, subdivision (a)(1). It also alleged that Niera had served seven prior prison terms for purposes of the one-year enhancement provided by Penal Code section 667.5, subdivision (b).<sup>1</sup> The jury found Niera guilty of burglary. In a bifurcated proceeding, the trial court found four of the Three Strikes and section 667, subdivision (a)(1) allegations were true, and found the prior prison term allegations (§ 667.5, subd. (b)) were not true. The trial court denied a defense motion to dismiss three of the four

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<sup>1</sup> All further section references are to the Penal Code.

remaining Three Strikes allegations. Niera was given a combined state prison sentence of 30 years to life.

Niera contends there was insufficient evidence to sustain the burglary conviction, that the trial court should have dismissed three of the four Three Strikes allegations, and that sentencing error occurred.

## **DISCUSSION**

### *1. There Was Sufficient Evidence That Niera Committed Burglary*

The crime of burglary requires proof that the defendant entered a dwelling with the intent to commit larceny or any felony. (§ 459.) Although Niera concedes there was evidence that he was moving about the Felestian apartment complex in a suspicious manner consistent with “casing” the building for some planned crime, he contends the absence of evidence that he actually entered Felestian’s apartment makes any finding that he in fact did so speculative because it is based on nothing more than suspicion. (See *People v. Bamber* (1968) 264 Cal.App.2d 625, 629.) As a result, he contends, there was insufficient evidence to sustain the conviction.

When a defendant challenges the sufficiency of the evidence to sustain a judgment, we review the whole record in the light most favorable to the judgment to determine whether there was substantial evidence upon which a trier of fact could find the defendant guilty beyond a reasonable doubt. Evidence is substantial when it is reasonable, credible, and of solid value. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251 (*Prince*)). We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence, whether it was direct or circumstantial. (*Ibid.*)

Direct evidence of entry is not required to sustain a burglary conviction, and entry may be shown by circumstantial evidence. (*In re Anthony M.* (1981) 116 Cal.App.3d 491, 501.) In *People v. Naughton* (1969) 270 Cal.App.2d 1, the court held there was sufficient evidence the defendant was the person who stole the coin box from a coffee

shop's pay phone when witnesses: saw him and his accomplice in the restaurant when the crime occurred; saw both men leaving the restaurant seconds after an alarm buzzer sounded; noticed that the accomplice had nothing in his hand, while defendant had a coat wrapped around one of his hands and tossed the coat into a car and drove off; and saw the defendant acting suspiciously at the location of an earlier pay phone theft. (*Id.* at pp. 4-7.) The evidence here is similarly sufficient.

As noted, Niera concedes there was evidence that he was inside the apartment complex, casing it for some illegitimate purpose. This included evidence that he went from floor to floor, moving the surveillance cameras in an effort to conceal his activities. Similar to *Prince*, he rang the doorbell of one apartment, and then offered the pretext that he was on the wrong floor when the tenant opened the door. He returned to the building three days later, and, based on Cool's testimony and the surveillance video, an inference can be drawn that he damaged the front gate latch in an effort to gain entry again. A short time later, the police saw him trying to enter another nearby apartment building. In his possession were gloves and a screwdriver, which are commonly carried by burglars. Based on *People v Naughton*, *supra*, 270 Cal.App.4th at pages 4-7, we believe there was sufficient evidence for the jury to find that Niera was the person who broke into Felestian's apartment.<sup>2</sup>

2. *The Trial Court Did Not Abuse Its Discretion When It Dismissed Only Some of Niera's Three Strikes Priors*

The information alleged that Niera had four prior Three Strikes convictions from a 1999 California case: three for first degree residential burglary and one for assault with a deadly weapon. It also alleged four 1989 Florida convictions from three separate cases – three for residential burglary and one for burglary. The trial court found true the four

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<sup>2</sup> The third floor tenant who found the piece of a dollar bill taped to her front door's peephole testified she was having furniture delivered at about the same time Niera was in the building. Niera contends this left open the possibility the deliverymen were the thieves. His assertion is speculative, and, at best, does no more than raise an evidentiary conflict that the jury was free to resolve.

California convictions and granted a motion of acquittal as to the four Florida allegations. Niera moved to dismiss at least three of the four California strikes pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 on the grounds that he was 64 and in poor health due to diabetes, and that only one of the convictions involved a violent crime. In denying the motion, the trial court gave the following reasons for its order: (1) Niera's age and health problems did not prevent him from committing the current offense, and he appeared to be looking to burgle again when he was arrested; (2) he had numerous other convictions, including a 1975 federal drug case, a 1984 California drug case, the four 1989 Florida convictions, and a 2003 Florida burglary conviction that resulted in a Three Strikes-like life sentence that was reversed on appeal; (3) Niera did not learn his lesson from the Florida life sentence that was reversed; and (4) he was precisely the type of repeat offender the Three Strikes law was designed to punish.<sup>3</sup>

The trial court had discretion to dismiss the strike priors in the interests of justice under section 1385. Niera contends the court abused its discretion by failing to do so because the four California convictions occurred in the same year, only one was a violent offense, and his age and poor health made even a one-strike sentence adequate. According to Niera, the trial court appeared to have predetermined its ruling and exhibited antipathy toward him. We disagree.

We review the trial court's ruling under the abuse of discretion standard. As such, Niera carries the burden of showing that the trial court's ruling was irrational or arbitrary. Absent such a showing, we presume the trial court acted to further the legitimate sentencing objectives of the Three Strikes law. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 904.) Nor may we reverse just because reasonable people might disagree with the ruling. (*Ibid.*) As a result, an abuse of discretion occurs only when the

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<sup>3</sup> The probation report showed that Niera had numerous other felony and misdemeanor convictions, including: Florida burglaries in 1965, 1966, 1987, 1989 and 1990; and California convictions in 1980 for carrying a concealed weapon, in 1984 for carrying a loaded firearm in a public place, for battery in 1986, and inflicting corporal injury on a spouse in 1987. Niera does not contest the truth of any of the convictions that appear in the record.

trial court was not aware of its discretion to dismiss, where the court considered impermissible factors, or where its decision was not in conformity with the spirit of the law. (*Id.* at pp. 904-905.) The analytical touchstone is whether, in light of the nature and circumstances of the present felonies and prior qualifying convictions, and the particulars of the defendant's background, character, and prospects, he may be deemed outside the spirit of the Three Strikes law, in whole or in part, and should therefore be treated as if he had not previously been convicted of the other qualifying felonies. (*Id.* at p. 905.)

The trial court expressly considered Niera's age and health problems, but rejected them as reasons to strike any of the priors because they did not deter him from burglarizing Felestian or from returning to the building to commit more burglaries. Given that, and Niera's lengthy criminal record and repeated burglaries, we hold the trial court did not abuse its discretion by denying the motion to dismiss any of the Three Strikes prior convictions. (*People v. Philpot, supra*, 122 Cal.App.4th at p. 906.)

### 3. *No Sentencing Error Occurred*

Under section 667, subdivision (a)(1), the trial court must impose a five-year sentence enhancement for each prior serious felony conviction that was brought and tried separately. (§ 667, subd. (a)(1).) The trial court found true that Niera had four prior convictions under that statute, but all four were tried together in a consolidated proceeding. As a result, only a single five-year enhancement could be imposed for those four convictions. (*In re Harris* (1989) 49 Cal.3d 131, 136; *People v. Deay* (1987) 194 Cal.App.3d 280, 286.) The trial court's minute order and the abstract of judgment both state that the court imposed a single five-year enhancement pursuant to section 667, subdivision (a)(1). At the sentencing hearing, the trial court noted that the four convictions were "resolved in one case [and] cannot be resolved separately," but the transcript reflects the court stating it would therefore impose a *15-year sentence* under section 667, subdivision (a)(1).

Niera's initial appellate briefs contended this conflict between the reporter's and clerk's transcripts showed error that we had to resolve. Respondent initially contended

that the three separate case numbers originally assigned to the four charges that were later consolidated supported the imposition of three five-year enhancements. We asked for and received supplemental briefing on two issues: (1) whether the consolidated trial of the four prior convictions precluded the imposition of anything other than a single five-year enhancement; and (2) if so, whether we should simply affirm the legally correct judgment reflected in the abstract of judgment, instead of remanding for resentencing.

Respondent now concedes that only one enhancement was proper, and asks that we simply affirm the legally correct judgment that appears in the abstract of judgment. Niera insists that the conflict with the reporter's transcript requires a remand for resentencing. We agree with respondent. The judgment itself imposes the legally correct sentence, and there is no error to correct. To obviate Niera's concerns about any possible misuse of the incorrect reporter's transcript, we warn against any such action and state again that the abstract of judgment is correct.

#### **DISPOSITION**

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.